

Atty. Docket No.  
005127.00033

PATENT

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In Re Patent Application of:  
**Daniel R. Potter, et al.**

Application No.: 10/099,685

Filed: March 14, 2002

For: Custom Fit Sale of Footwear

Examiner: Andrew J. Rudy

Group Art Unit: 3627

Confirmation No.: 4915

**REQUEST FOR WITHDRAWAL OF ERRONEOUSLY-ISSUED NOTICE OF  
ABANDONMENT SUBMITTED WITH APPEAL BRIEF**

Honorable Commissioner for Patents  
U.S. Patent and Trademark Office  
Customer Service Window  
Randolph Building  
401 Dulany Street  
Alexandria, VA 22314

Sir:

Appellants respectfully request that the Office withdraw the erroneously issued Notice of Abandonment mailed on November 26, 2008. Appellants request accompanies a timely filed Appeal Brief. Appellants request that the Office enter the Appeal Brief herewith.

Appellants received a Final Office Action mailed December 6, 2007 and timely filed a Notice of Appeal on June 5, 2008. The time period provided to an appellant for filing an Appeal Brief is calculated to be two months from the date on which the Notice of Appeal is filed according to 37 C.F.R. 41.37(a) and MPEP § 1205.01. Five months of extensions are available, upon proper request and payment of fees, which gives the appellant up to seven months from the date on which the Notice of Appeal was filed to submit an Appeal Brief. Here, Appellants assert that the final date on which an Appeal Brief in the above-referenced application must be filed should be set for January 5, 2009.

The Manual of Patent Examining Procedure §1205.01, "Time for Filing Appeal Brief," states that 37 C.F.R. 41.37(a) provides two months from the date of the notice of appeal for the

Appellant to file an appeal brief.” This MPEP section further explains that “[i]n the event that the appellant finds that he or she is unable to file a brief within the time period allotted by the rule, he or she may file a petition, with fee, to the Technology Center (TC), requesting additional time under 37 CFR 1.136(a).” Rule 1.136(a) provides the time period for reply may be the expiration of any maximum period set by statute or five months after the time period set for reply, if a petition for an extension of time and the fee are filed.” Many actions by an applicant do not have a statutory time period within which to reply and are afforded a time period for reply of five months from the triggering date (*e.g.*, the filing of a Notice of Appeal). Specifically, the time period set for filing an Appeal Brief does not have a statutory requirement setting a period of response and may be extended up to five months from the date of filing the Notice of Appeal under 37 C.F.R. 1.136(a). Based on these rules, an appellant is provided with a maximum of seven months after the Notice of Appeal is filed in which to file an Appeal Brief. Here, a calculation of seven months after the Notice of Appeal would be January 5, 2009. Thus, Examiner Rudy erroneously issued the Notice of Abandonment on November 26, 2008.

Further, Appellants conducted a personal interview with Examiner Rudy on December 9, 2008 regarding the erroneously issued Notice of Abandonment. Appellants and Examiner Rudy discussed the rules and MPEP sections regarding the calculation of the final due date for filing an Appeal Brief. Examiner Rudy agreed to withdraw the Notice of Abandonment upon confirmation that the date for filing an Appeal Brief is calculated from the date on which the Notice of Appeal is filed rather than the issue date of the Final Office Action. After the telephone conversation, Appellants sent an email to Examiner Rudy identifying MPEP §1205.01, outlined above, that supports its position.

Appellants respectfully request that the Office withdraw the erroneously issued Notice of Abandonment and permit the submission of the Appeal Brief filed herewith.

Respectfully submitted,  
BANNER & WITCOFF, LTD.

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